Supreme Court, U. S.
FILED
MAY 13 1980
MICHAEL RODAK, JR., CLERK

No. 79-1361

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN JAY BEATTIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 613 F. 2d 762.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1980. The petition for a writ of certiorari was filed on March 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was error for the district court to give an "*Allen* charge" on the facts of this case.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner

was convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371.

In the late afternoon of May 30, 1978, after four days of trial the jury retired, deliberated for an hour, and recessed for the night (Pet. App. 2). The following morning the jury resumed its deliberations and continued throughout the day. Twice the jury sought the court's assistance, first requesting reinstruction on the elements of mail fraud, and later asking to have the testimony of a prosecution witness read from the record (*ibid.*).

The next day, after deliberating two hours, the jury submitted to the court four questions regarding the offense charged and the procedure for reaching a verdict. After answering the questions, the judge asked the jurors whether they had reached a verdict on any count of the indictment. The foreman indicated that they had not (Pet. App. 2). At this point, the judge made the following statement to the jury (Pet. App. 2-3):

> Just a word or two about approaching your task.
>
> It frequently develops that a jury may be evenly divided where half of you think there's reasonable doubt, the other half see no reasonable doubt. I'd suggest in a case like that, if half or almost half of you have doubts about the proof, that those who have no doubts would wonder if they were right to be as certain as they are when a substantial number of other jurors seem to find doubts about the sufficiency of the evidence.
>
> Conversely, it would seem to me that if only one or two had doubts, that they should reappraise those doubts and consider the views of the fellow jurors and decide whether those doubts are reasonable when

> so many of their fellow jurors don't see them as reasonable doubt.
>
> This is simply a method of reexamining your views about the case and it is without any intention of the Court to suggest that anyone should give up an honestly held conviction about the weight and sufficiency of the evidence. But you will recall I did tell you that it would be desirable, from time to time, to reappraise your views, to consider the impact on your views and the views of your fellow jurors and to change your views from time to time if you thought it appropriate to do so.
>
> But always remember that it is your conscientious view about the evidence that must control and you don't give up a conscientiously held view solely for purposes of arriving at a verdict, although, as I say, it is highly desirable that there be a verdict on all or substantially all of the counts or at very least on some of the counts.
>
> Any other questions that you wanted to raise now? All right, You will resume your deliberations. We will be at your call.

Following a one and one-half hour lunch break and three and one-half hours of further deliberations, the jury returned guilty verdicts on five counts of mail fraud and one count of conspiracy. The jury failed to reach agreement on five other counts, and as to them, a mistrial was declared (Pet. App. 3, 4, 6). On appeal, petitioner claimed that the supplemental instruction set out above "coercively produced the guilty verdict and deprived him of a fair trial" (Pet. App. 1). The court of appeals rejected the claim and affirmed the conviction (Pet. App. 1-10), concluding that "an examination of the instruction under all the circumstances reveals no coercion" (*id.* at 10).

ARGUMENT

The supplemental instruction given here—urging each juror to reconsider his or her views in light of views expressed by other jurors, while at the same time admonishing them not to give up conscientiously held views solely for the purpose of arriving at a verdict—was plainly within the limits set forth in *Allen* v. *United States*, 164 U.S. 492 (1896). As the court of appeals observed (Pet. App. 7), "the charge given by the trial judge in this case contained all of the elements of the charge initially sanctioned by the Supreme Court in *Allen*." It " 'sufficiently reminded each of the jurors of his obligation to give ultimate controlling weight to his own conscientiously held opinion,' " and nothing in it, express or implied, " 'was more coercive in tendency than the language' " approved in *Allen* (Pet. App. 8, quoting *Sullivan* v. *United States*, 414 F. 2d 714, 718-719 (9th Cir. 1969)).[1]

Petitioner notes that the courts of appeals appear to be divided on "the acceptability of the *Allen* instruction" (Pet. 7) and urges this Court to resolve the conflict. We disagree. It is true that four circuits have directed, in the exercise of their supervisory powers, that the *Allen* charge not be given except in a substantially modified form (see *United States* v. *Angiulo*, 485 F. 2d 37 (1st Cir. 1973); *United States* v. *Fioravanti*, 412 F. 2d 407 (3d Cir. 1969);

[1]Nor do the circumstances surrounding the giving of the instruction evidence coercion. As the court of appeals observed (Pet. App. 8-10), the period of deliberation following the *Allen* charge was sufficiently long to permit jury members to reach a reasoned decision; the total length of the deliberations was not so disproportionate to the needs of the case as to give rise to the inference that the charge coercively produced the result; the charge was not given in an atmosphere of frustration over the deadlock; and the trial judge was unaware of the manner in which the jury was divided. Moreover, the jury obviously went about its task conscientiously in view of the fact that at the conclusion of its deliberations it remained "hung" on nearly half the counts.

United States v. *Silvern*, 484 F. 2d 879 (7th Cir. 1973) (en banc); *United States* v. *Thomas*, 449 F. 2d 1177 (D.C. Cir. 1971) (en banc)), whereas the Ninth Circuit continues to approve the traditional charge so long as " 'in its context and under all the circumstances' " it does not have a coercive effect upon the jury (Pet. App. 4-5). However, no court of appeals has found the *Allen* charge to be per se coercive or held that it violates any constitutional right. And all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict.

The differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction in a context in which some variation in practice among the circuits is tolerable. Accordingly, the issue does not warrant review by this Court at the present time. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. *E.g.*, *Herko* v. *United States*, cert. denied, No. 79-5065 (Nov. 5, 1979); *Braverman* v. *United States*, cert. denied, 439 U.S. 964 (1978); *Dyba* v. *United States*, cert. denied, 434 U.S. 830 (1977); *Perez-Vega* v. *United States*, cert. denied, 424 U.S. 970 (1976); *Lee* v. *United States*, cert. denied, 422 U.S. 1044 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1980

DOJ-1980-05